STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM P. IRWIN, doing business as IRWIN POTATO FARMS, and CYNTHIA R. IRWIN,

Plaintiffs-Appellees,

v

DURUSSEL & DURUSSEL, INC., and MATTHEW DURUSSEL,

Defendants-Appellants.

UNPUBLISHED
June 1, 1999

No. 205706
Saginaw Circuit Court
LC No. 93-056041 NZ

WILLIAM P. IRWIN, doing business as IRWIN POTATO FARMS, and CYNTHIA R. IRWIN,

Plaintiffs-Appellants,

v

DURUSSEL & DURUSSEL, INC., and MATTHEW DURUSSEL,

Defendants-Appellees.

No. 205712
Saginaw Circuit Court
LC No. 93-056041 NZ

Before: Markman, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

In Docket No. 205706, defendants appeal as of right the trial court's order denying their motion for a judgment notwithstanding the verdict and a new trial, and the judgment entered in favor of plaintiffs. In Docket No. 205712, plaintiffs appeal the trial court's order reducing the verdict amount by $297,000. These cases were consolidated on appeal. We reverse and remand for entry of a judgment notwithstanding the verdict.

This appeal arises from the denial of a crop insurance claim filed by plaintiffs for a potato crop loss in 1992. Defendant Matthew DuRussel of defendant DuRussel & DuRussel, Inc. insurance agency sold two potato policies to plaintiffs from Crop Hail Management, the management company for Mutual Service Casualty Insurance Company.[1] When the insurance company refused to pay plaintiffs' potato claim at the end of the 1992 crop year, plaintiffs claimed that defendants tortiously interfered with the contract.[2] In their amended complaint, plaintiffs alleged that DuRussel "intentionally, wrongfully, and falsely informed Defendants Mutual Service Casualty Insurance Company and Crop Hail Management, Inc. that Plaintiffs never intended to harvest their crop, had no place to store their crop if harvested, were poor farmers, and were 'farming for the insurance benefits,'" which caused the breach of the insurance contract.

At trial, much of the testimony focused upon the economic and emotional damages that the failure to collect insurance caused to plaintiffs. William Irwin testified that the cold, wet weather prevented him from harvesting about sixty percent of his potato crop in 1992. Irwin said that before 1992, plaintiffs used a nearby storage facility at the Wetzel farm. He admitted that he was unable to come to an agreement in 1992 with Gary Meyer, who rented the farm that year, concerning plaintiffs' continued use of the facility, so plaintiffs left this storage facility. However, Irwin testified, he had another storage facility lined up in July 1992 and the use of two more storage facilities were arranged later in the fall. Several of plaintiffs' neighboring potato farmers testified that 1992 was a bad year for potatoes and that their potato claims were paid in 1992.

James Colville, who adjusted crop losses on a part-time basis, opined that the adjusting by Jack Brinkman, the independent adjuster who was hired by Crop Hail to adjust plaintiffs' claim, was improper and that the claim should have been paid. In response to a hypothetical situation in which an agent told Crop Hail that plaintiffs had no place to store their potatoes and this information was false, he stated that this action would be unethical and that there was no legitimate reason for telling this to an insurance company. However, he said that it would be proper for an agent to answer an adjuster's questions about a claim, that an agent has a duty to talk with the company and advise it of potential problems that would affect the validity of a claim, and that preventing insurance fraud would be a legitimate reason to give an insurance company information learned by the agent.

Ann Flattery, the credit manager for Berger and Company, to whom plaintiffs had assigned their interest in the insurance policy as security for farm operating loans, testified that she called DuRussel several times to find out why plaintiffs' claim had not been paid. She testified as follows:

> [W]henever I would call Matt, when I would ask him what they are going to do about Bill's claim and what the status of the claim was, Matt always first laughed. And instead of responding to my questions, he would make comments. Some of the comments that I recall was: You know that Bill doesn't have any storage; you know that he really didn't plan on taking those potatoes out of the ground; you know he's only farming for the insurance; and you know that Bill isn't a very good farmer. And he comments to me about fraud.

The only witnesses who testified regarding DuRussel's contact with the insurance company, and therefore his alleged interference with plaintiffs' contract, were Matthew DuRussel, Jack Brinkman and John Mack, the regional claims manager for Crop Hail. DuRussel denied any attempt to cause plaintiffs' insurance to be denied. He stated that he did not participate in the claim process beyond assisting when someone requested him to furnish information. He acknowledged that in August 1992, he told either Brinkman or Mack that he had a concern about plaintiffs' storage capacity at the Wetzel facility in response to questions after plaintiffs apparently lost the storage facility. He denied saying that plaintiffs had *no* storage and he denied Flattery's testimony regarding his statements. However, DuRussel was impeached with his deposition testimony, in which he stated that he told either Mack or Brinkman: "My concern that I told him is that there's a lot of acres of potatoes there, you know. He's leaving the storage over here. That was the concern I had," referring to the Wetzel storage facility. He was also impeached with deposition testimony that "I volunteered the information to them because if you have 700-some acres of potatoes and no home for them, right, you should have a home. You've got to have someplace to put the potatoes in the wintertime," and that "[i]n my opinion, you have to put the potatoes someplace before they freeze into the ground. If you have no place to put them, I don't believe that you should be getting paid on a claim, in my opinion." He further stated at his deposition, in response to a question of whether the claim was denied because plaintiffs had no storage, that "[t]he information I was told by Crop Hail Management, to the best of my knowledge, that is the reason the claim was denied."

Jack Brinkman testified that he went to plaintiffs' farms and determined that plaintiffs did not have an insurable loss for potatoes because crop production exceeded the guaranteed minimum crop amount for potatoes. He denied that DuRussel interfered with plaintiffs' insurance contract. Brinkman testified that plaintiffs had a good potato crop, but did not appear to be harvesting it in 1992. Thus, based on his appraisal of the crop in the field, production exceeded the guarantee under the insurance policy. He stated that William Irwin told him that he had lost storage in August 1992 and showed him one other storage facility that would hold only about ninety acres of potatoes, although plaintiffs were farming almost five hundred acres of potatoes. Brinkman said that he cited lack of sufficient storage in his special report to Crop Hail because storage is one factor to consider when determining whether a farmer is making an attempt to harvest his crop. He stated that he did not recommend denial of plaintiffs' claim only because of storage. In Mack's deposition testimony, admitted at trial, he stated that he made the ultimate decision to deny plaintiffs' claim because production in the field exceeded the insurance guarantee and that an insurance agent does not have the right to reject or accept any claim. In addition, he testified that the storage issue may have been discussed as a consideration.

George Schlegel, a former foreman for plaintiffs testified that plaintiffs had a good crop in 1992, but that William Irwin told him not to harvest in some fields because it might affect plaintiffs' insurance claim. He felt that William Irwin simply intended to collect on the insurance and thus get more money than if he harvested.

After the close of proofs, both parties moved for a directed verdict, but the court stated: "I would not think of not letting this jury decide this case after all that they have heard." The jury returned a verdict in favor of plaintiffs for $1,000,000-- $600,000 for lost profits and $400,000 for emotional

distress. The Court granted a reduction of $180,000 in the amount of the judgment, citing the "settlement with co-defendant." After entry of this judgment, defendants filed a motion for a judgment notwithstanding the verdict (JNOV) and, in the alternative, for a new trial and remittitur. At the hearing, the trial court stated, regarding the jury verdict:

> I was stunned, and I've been in this job for eight years, and I have not been as shocked . . . I don't want to grant defendant's motion. I believe in the province of the jury. I have never overruled a jury before. If I do it this time, I hope that there will never be an occasion in my career as a judge that I would ever do it again.

The court subsequently denied the motion for JNOV, citing only DuRussel's deposition testimony, which was used at trial to impeach him, in which he stated that he was given information from Crop Hail that the claim was denied because plaintiffs had no storage, and that DuRussel volunteered to Brinkman or Mack that plaintiffs "did not have storage," in the words of the court. However, the court further reduced the verdict by $297,000, citing the settlement between Crop Hail and Berger.

In Docket No. 205706, defendants first argue that the trial court improperly denied their motion for JNOV because plaintiffs failed to establish tortious interference with a contract.

> The standard of review for JNOV requires review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party . . . . Only if the evidence so viewed fails to establish a claim as a matter of law, should a motion for judgment notwithstanding the verdict be granted. [*Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998) (citations omitted).]

In *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984), this Court set out the test for determining whether a plaintiff has alleged a claim of tortious interference with a contract:

> [O]ne who alleges tortious interference with a contractual . . . relationship must allege the intentional doing of a per se wrongful act or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiff's contractual rights . . . . Under the latter instance, plaintiff necessarily must demonstrate, with specificity, affirmative acts by the interferor which corroborate the unlawful purpose of the interference.

A "per se wrongful act" is that which is "inherently wrongful" or can never be "justified under any circumstances." *Formall, Inc v Community National Bank of Pontiac*, 166 Mich App 772, 780; 421 NW2d 289 (1988). However, "per se illegal acts" are not a prerequisite to liability under the tort of interference with a contract. *Feldman, supra* at 369. Tortious interference can also be established by intentionally doing "a lawful act with malice and unjustified in law for the purpose of invading plaintiff's contractual rights." *Id.* This determination in *Feldman* was based in part on *Bahr v Miller Bros Creamery*, 365 Mich 415, 425; 112 NW2d 463 (1961), where the Supreme Court held that "otherwise lawful acts may be actionable" if the defendant "intentionally and actively induced the breach." In addition to being intentional, the interference must be "improper," i.e., illegal, unethical or

fraudulent. *Trepel v Pontiac Osteopathic Hospital,* 135 Mich App 361, 377; 354 NW2d 341 (1984); *Weitting v McFeeters,* 104 Mich App 188, 197-98; 304 NW2d 525 (1981). Therefore, according to the standard jury instructions, the elements for tortious interference with a contract are: (1) plaintiff had a contract with a third party; (2) defendant knew of the contract; (3) defendant intentionally interfered with the contract; (4) defendant improperly interfered with the contract; (5) defendant's conduct caused the third party to breach the contract; and (6) plaintiff was damaged as a result of defendant's conduct. SJI2d 125.01.

Accordingly, we must look to see whether plaintiff established a prima facie case of interference with a contract by proving all of the elements of the tort in this case. Defendants do not dispute the first and second elements of the tort. It is clear that plaintiffs did have insurance contracts with the insurance company through Crop Hail, and that Matthew DuRussel was the insurance agent who brokered such contracts. However, the remaining elements are more problematic.

The third and fourth elements require that plaintiffs set forth evidence that defendants intentionally and improperly interfered with the contract, in essence that defendants acted with the primary improper purpose to cause the breach and to do so in a manner that was fraudulent, unlawful, unethical or not justified under any circumstances. SJI2d 125.03; SJI2d 125.04. On appeal, plaintiffs do not argue that there is any evidence that defendants ever told Crop Hail or the insurance company that "plaintiffs never intended to harvest their crop" or "were poor farmers, and were 'farming for the insurance benefits,'" as stated in their amended complaint. Rather, plaintiffs rely upon defendant DuRussel's own testimony as proof of their allegation that defendant told Crop Hail that plaintiffs "had no place to store their crop if harvested." At trial, DuRussel was impeached with deposition testimony in which he stated that he told either Mack or Brinkman that he had a concern that plaintiffs were losing their storage at Wetzel's farm. Although he stated at trial that he only told this to Mack or Brinkman in response to their questions, he was also impeached with deposition testimony that he volunteered the information to them and that, in response to a question of whether the claim was denied because plaintiffs had no storage, he said, "[t]he information I was told by Crop Hail Management, to the best of my knowledge, that is the reason the claim was denied." In addition, plaintiffs argue that Flattery's telephone conversation with DuRussel shows that his actions were intentional and purposeful. Although there was testimony contrary to the evidence used to impeach DuRussel's trial testimony, we need only look to the evidence in support of plaintiffs' claim to determine whether it was sufficient to raise a question of law that must be decided by the jury. *Forge, supra* at 204.

In assessing the propriety of DuRussel's conduct, we may consider several factors. These include (1) the nature of the defendant's conduct; (2) defendant's motive or reasons for its actions; (3) the nature of plaintiffs' contractual interest; (4) the interests that defendant sought to advance; (5) society's interest in protecting the freedom of defendants to engage in such conduct and protecting contractual relationship such as plaintiffs'; (6) how directly defendant's conduct influenced the breaching party; and (7) the nature of the relationships of plaintiffs, defendants and the parties to the contract. SJI2d 125.04 (Comment); *Jim-Bob, Inc v Mehling,* 178 Mich App 71, 96-97; 443 NW2d 451 (1989). In this case, DuRussel stated that he told either Mack or Brinkman: "My concern that I told him is that there's a lot of acres of potatoes there, you know. He's leaving the storage over here. That

was the concern I had," referring to the Wetzel storage facility. However, he repeatedly denied ever telling the insurance company or Crop Hail that there was *no* storage. DuRussel's testimony that Crop Hail told him that it denied plaintiffs' claim because they had no storage is not attributable to defendant, but only to the company itself; there is no indication that DuRussel told Crop Hail that plaintiffs had no storage. DuRussel also said that he volunteered such information to either Brinkman or Mack, but never stated that he sought them out or called them. The only evidence at trial was that Brinkman and Mack were calling the office and stopping by for information, including information regarding plaintiffs' storage abilities, and that DuRussel relayed his concerns to them at this time. And in contrast to plaintiffs' hypothetical to Colville at trial regarding an agent giving a false statement about storage, DuRussel's concerns about plaintiffs leaving the Wetzel storage facility were true, according to Irwin himself, who admitted that he left Wetzel storage in summer 1992. Even if DuRussel *had* told Crop Hail that there was no storage, there was no evidence put forth at trial that he either knew this information to be false or that he had any improper purpose for conveying such information to Crop Hail. This is the full extent of the evidence of DuRussel's conduct in telling Crop Hail about plaintiffs' troubles. There is no other evidence that DuRussel was in any way involved in assessing plaintiffs' potato claim and, in fact, several witnesses testified that agents are not allowed to make substantive decisions in the claim process.

DuRussel simply conveyed his concern regarding plaintiffs' admitted loss of a storage facility to Crop Hail when discussing plaintiffs' claim at Crop Hail's instigation. There was no reason set forth at trial as to why one should doubt that DuRussel's concern about storage, which could be a factor in either bad farming or actual fraud, was legitimate.[3] There was also no evidence produced at trial that it is inappropriate for an agent to talk to the adjuster or insurance company, and in fact there was testimony from both parties' experts that an agent should properly answer questions and relay his concerns about a claim. We note that "it is incumbent upon one representing an insurance company as its agent to disclose, by prompt communication, all material knowledge of facts possessed by him or her relating to matters in his or her charge which it is important the principal should know, whatever may be the source of his or her knowledge" because the agent is liable for failure to disclose such information. 4 Couch, Insurance, 3d, §54:3; *Hawkeye Casualty Co v Frisbee,* 316 Mich 540, 548; 25 NW2d 521 (1947). Certainly any information relating to insurance fraud or bad farming practices would be material to the insurance company. However, even if the storage information was not ultimately "material," we can hardly accept the notion that an agent providing such information about an insured to an insuror is acting in a *per se* wrongful or improper manner. Indeed, we believe that society has an interest in generally encouraging agents to communicate their legitimate concerns about claims to an insurance company. See SJI2d 125.04 (Comment); see also *Wood v Herndon & Herndon Investigations, Inc,* 186 Mich App 495, 504; 465 NW2d 5 (1990).[4]

According to the comment to SJI2d 125.04, we may also assess the propriety of DuRussel's actions, in part, by considering how directly his conduct influenced the breaching party. Pursuant to the JNOV standard to view the evidence in the light most favorable to plaintiffs, we accept for the purposes of this appeal that the lack of storage was the sole reason for the denial of plaintiffs' claim and thus that the contract was breached. However, even with such an assumption, we believe that DuRussel's influence upon such breach was at most indirect. See SJI2d 125.04 (Comment). Plaintiffs argue that it

was improper for Crop Hail to deny their claim because of storage. There was clear testimony at trial that an agent cannot make the decision to grant or deny an insurance claim and that insurance companies do not like their agents to become involved in the claim process. This testimony was undisputed. Certainly agents can and should provide information to adjusters and insurance companies during the claim process, but it is up to those at the insurance company responsible for deciding the claim to investigate information and to determine if such information affects a claim. In this case, it is clear that Brinkman's investigation of plaintiffs' storage capacity, and subsequent inclusion of their lack of storage in his special report to Crop Hail, was the direct influence of the decision to deny coverage. The only witness who even recalled that DuRussel mentioned the storage issue with regard to plaintiffs was DuRussel himself. Although we acknowledge that this factor is not decisive by itself, DuRussel's indirect influence, if any, is a factor that we consider applicable to the determination of the propriety of his actions.

In addition, there is a lack of any improper motive on DuRussel's part in communicating his storage concerns to Crop Hail. See SJI2d 125.04 (Comments). He testified that it was to his *advantage* that an insurance claim be paid, because an agent's commission was the first thing taken out of the claim check, so that there was a possibility that he DuRussel would not get paid if the farmer did not get his payment. DuRussel also said that if the farmer did not collect upon a claim, he would likely lose the farmer as a customer. The trial court correctly stated that there was testimony that DuRussel was, in fact, paid by Berger even though the claim was not paid. However, this does not in any way impute to DuRussel an improper motive and DuRussel did indeed lose a customer as a result of this insurance denial. Rather, it appears that DuRussel was motivated by a legitimate business interest-- to communicate to the insurance company, through Crop Hail, his concerns about a matter that could possibly impact upon a claim. Although it appears that the mere lack of storage would not be a legitimate reason to deny an insurance claim under plaintiffs' policy, it would nevertheless be a factor to consider in determining whether a farmer actually intended to harvest his crop.

Overall, there is no indication from the evidence produced at trial that DuRussel had an improper purpose or intended to cause a breach of contract. Plaintiffs point to Ann Flattery's testimony that DuRussel told her that plaintiffs were not good farmers, were only farming for insurance and had no storage, as evidence that defendants' actions were improper. However, Flattery's testimony is not pertinent to this issue because it does not provide evidence either that DuRussel told the same to the insurance company or Crop Hail, or that he intended to cause a breach. It is evidence simply of his opinion of plaintiffs' farming practices. Similarly, DuRussel's deposition testimony that "in my opinion, you have to put the potatoes someplace before they freeze into the ground. If you have no place to put them, I don't believe that you should be getting paid on a claim, in my opinion," evidences only that he did not believe a claim should be paid under those circumstances. It does not show that DuRussel intended thereby to cause a breach of the contract or that he acted upon this belief in any improper manner. Indeed, there is no evidence that DuRussel even conveyed this opinion to the insurance company or Crop Hail. Although we must view the evidence in the light most favorable to the nonmoving party, this does not mean that we must blindly adopt plaintiffs' bare assertions. There must be some evidence from which to draw reasonable inferences. Here, we find no evidence in the record that defendants acted in a manner that was improper or intended to cause a breach of contract. Since

we have determined that plaintiffs did not establish at least two elements of the tort of tortious interference with a contract, we do not need to address the fifth element, i.e. whether defendants in fact caused a breach of the contract.

Although plaintiffs here may have established a prima facie case of breach of contract, any damage from this action was attributable only to the parties who actually breached the contract. Plaintiffs may have suffered damages for which they were not fully compensated by the settlement of the breach of contract issue, but they cannot properly hold defendants accountable since they have not demonstrated the elements of tortious interference with a contract. Although we are cognizant of the deference to be accorded to a jury's decision, the trial court must not abandon its own authority to see that the law is followed correctly. Where the evidence fails to establish even a prima facie case, the trial court must grant a directed verdict, or in the alternative, a judgment notwithstanding the verdict. As evidenced by this case, there is a real risk of treating legitimate business practices as falling within the scope of tortious interference; thus, it is particularly important that the judiciary ensures that each of the traditional elements of this tort be clearly satisfied. Here, even after construing the evidence in a light most favorable to plaintiffs, we conclude that the record does not show that such elements were established by plaintiffs. Accordingly, we must reverse the trial court's order denying defendants' motion for a JNOV.

Defendants argue that, in the alternative to a JNOV, this Court should reverse the trial court's order denying their motion for a new trial and remand for a new trial. Defendants claim that the trial court improperly allowed plaintiffs to interject into the trial evidence of a settlement between plaintiffs and a former codefendant, improperly allowed James Colville to testify as to his expert opinion, and improperly allowed evidence regarding noneconomic damages and lost profits beyond the 1992 crop year. In addition, in Docket No. 205712, plaintiffs appeal the trial court's reduction of the verdict amount by $297,000. However, our resolution of the initial issue in this case makes it unnecessary to address the remaining issues raised on appeal. *Zander v Ogihara Corp*, 213 Mich App 438, 445-46; 540 NW2d 702 (1995).[5]

Reversed and remanded to the trial court for proceedings consistent with this Court's opinion. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin

[1] At the time of trial, both Crop Hail Management, Inc., and the insurance agency, Mutual Service Casualty Insurance Company, had settled with plaintiffs and breach of contract claims against them were dismissed.

[2] Plaintiffs' insurance claim for beans and corn, through the same agent, broker and insurance company, was paid in 1992.

[3] Plaintiffs questioned DuRussel regarding his friendship with Gary Meyer, who was renting the Wetzel farm and storage at the time that plaintiffs lost the storage in 1992 and who told DuRussel about plaintiffs leaving Wetzel storage. However, there was no evidence that this friendship influenced

DuRussel to act in an improper manner toward plaintiffs. DuRussel and Irwin had also been friends since they were children.

[4] By the communication of such information, "the customers of the insurance companies are served because more accurate claims investigations will result in containment of costs by allowing the insurance companies to more accurately detect fraudulent claims, thus presumably resulting in lower insurance premiums." *Wood*, *supra* at 504.

[5] Because it is unnecessary for us to deal with the issue of damages, we take no position on the conclusions advocated by the dissent in this regard.